Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 82-1174
IN THE

Supreme Court of the United States

October Term, 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT; LOIS EWEN; HARRIET ALLEN; MILDRED BENIOFF; HANK DOERFLING; MARY HENDERSON; HELEN MCABOY; JUDY ROSENER; JOHN RUSH; NAOMI SCHWARTZ; LYNN SCHENK; and RICHARD GOLDEN, each individually and as members of the California Coastal Commission; MICHAEL FISCHER, individually and as Executive Director of the California Coastal Commission; CALIFORNIA COASTAL COMMISSION, an agency of the State of California; and THE STATE OF CALIFORNIA,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Memorandum of Decision and Order of Dismissal.

United States District Court, Central District of California.

Interstate Marina Development Co., a limited partnership, Plaintiff, v. The State of California; California Coastal Commission, etc.; Michael Fischer, etc.; Dorill B. Wright; Lois Ewen; Harriet Allen; Mildred Benioff; Hank Doerfling; Judy Rosener; John Rush; Naomi Schwartz; Lynn Schenk; and Richard Golden, Defendants. No. CV-76-3270-MML.

Filed: October 23, 1980.

Plaintiff in this case has filed suit against the State of California; the California Coastal Commission; the executive director of the Coastal Commission, Michael Fischer; and the individual members of the Commission, both as individuals and in their official capacities. Plaintiff's claims arise from regulatory activities by the Commission over an approximately four year period.

Now before the Court is defendants' motion to dismiss the action for failure to state a claim for relief, or in the alternative to abstain from hearing the case. After careful consideration of the issues raised by the parties, the Court finds that dismissal must be granted as to some defendants, and as to some claims for relief. On those issues which remain, this Court declines to abstain, on the grounds that the issues are not so doubtful that they require preliminary interpretation by the state courts.

The Court orders dismissal as to the following defendants:

1. *All claims against the defendant State of California must be, and are dismissed.*

   The Eleventh Amendment has long been a bar to suit against a state by citizens of another state, or by the state's own citizens. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1973). As set forth in the opin-

ions of the United States Supreme Court, that immunity can be waived only by express Congressional action or by express waiver by the State itself.

In enacting 42 U.S.C. §1983 pursuant to §5 of the Fourteenth Amendment, Congress did not abrogate the Eleventh Amendment immunity of the States. *See Quern v. Jordon*, 440 U.S. 332 (1979). Bringing an action directly under one of the Constitutional amendments applicable to the states by virtue of the Fourteenth Amendment does not result in automatic waiver of the Eleventh Amendment. *See Alabama v. Pugh*, 438 U.S. 781 (1978).

California has not waived its immunity by virtue of California Public Resources Code §30334(b). The statute does not acknowledge liability for the actions of the Coastal Commission, but simply provides that the California attorney general will represent the Commission in litigation. This does not constitute an express waiver of immunity by the State.

2. *All monetary claims against the defendant California Coastal Commission must be, and are, dismissed.*

The California Coastal Commission, as an arm of the state, may not be sued for monetary damages. A recovery of damages against the agency would in reality subject the state treasury to liability, a result the Eleventh Amendment forecloses. *Edelman v. Jordan*, 415 U.S. 651 (1973). However, to the extent that plaintiff's suit seeks prospective declaratory or injunctive relief, it may still be maintained against the Commission.

3. *All claims against defendant Michael Fischer must be, and are, dismissed.*

Plaintiff has failed to state any facts which would

give rise to a cause of action or claim for relief against Fischer. All actions plaintiff alleges as the basis for this suit were performed by either the South Coast Regional Commission or the State Coastal Commission.

4. *All monetary claims against the Coastal Commissioners acting in their official capacity are dismissed.*

As with suit against the Coastal Commission, a monetary award against these officials would subject the state treasury to liability, and is therefore prohibited by the Eleventh Amendment. Prospective declaratory or injunctive relief could still be awarded against these defendants.

These defendants have also been sued individually. The Eleventh Amendment does not act as a shield in this situation, since recovery would not be had from the state treasury. *Ex Parte Young*, 209 U.S. 123 (1908); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). These officials may still be entitled to either absolute or qualified immunity for actions performed in the course of their official duties. The extent of this immunity cannot be decided on the basis of the papers and pleadings now before the Court. The question is therefore reserved for further proceedings.

The Court orders dismissal of the following claims for relief as to all defendants, on the grounds that they fail to state a claim for relief:

1. Plaintiff's Count Two for inverse condemnation is dismissed on the ground that the denial of a permit, like other planning activities, does not result in a permanent deprivation of property. There can be no unconstitutional taking of property where the party

is not permanently deprived of all reasonable use of its property. As demonstrated by the fact that plaintiff now has a permit to build, there has been no unconstitutional taking. *See Agins v. Tiburon*, 100 S.Ct. 2138, 2142-43 & n. 9 (1980).

2. Plaintiff's Count Three for unconstitutional taking and damaging of private property is dismissed on the ground that even if plaintiff's ability to develop its land was hampered by defendants' refusal to grant a permit, there is no taking in the constitutional sense since plaintiff is now free to sell or develop its property. *Agins v. Tiburon*, 100 S.Ct. 2138, 2142-43 & n. 9 (1980).

3. Plaintiff's Count Four alleges that the unconstitutional taking effected by defendants also violated plaintiff's civil rights. Since no claim of inverse condemnation or unconstitutional taking has been or could be plead by plaintiff, the dependent civil rights claim must also be dismissed.

Plaintiff's Count One, requesting declaratory relief on the issue of whether the State Commission could condition the Interstate Marina permit on the procurement by Marina Plaza of a construction bond is now moot, since the state court has decided this issue in plaintiff's favor.

The Court will retain jurisdiction over Count Five, which alleges an unconstitutional impairment of contract. The Court will also exercise its pendent jurisdiction over Count One, to the extent it requests declaratory relief on the issue of whether the Coastal Commission's refusal to hear the first appeal from the South Coast Regional Commission for lack of a substantial issue was res judicata and the second appeal therefore invalid. These issues do not turn on unclear issues of state law, nor would the determination of the state

law issue limit the constitutional question now before this Court. Plaintiff's motion for abstention is therefore denied.

THEREFORE, IT IS ORDERED that defendants' Motion to Dismiss is granted as to

1. Defendant State of California, on all claims, on Eleventh Amendment grounds;

2. Defendant Coastal Commission, on all claims for monetary relief, on Eleventh Amendment grounds;

3. Defendant Michael Fischer, on all claims, on the grounds that plaintiff has failed to allege any facts on which relief could be granted;

4. Defendants, the individual Coastal Commissioners sued in their official capacities, on all claims for monetary relief, on Eleventh Amendment grounds;

5. Plaintiff's Counts Two, Three, and Four, on the grounds that they fail to state a claim for relief;

6. Plaintiff's Count One requesting declaratory relief on the issue of the conditioning of its permit on the Marina Plaza project is moot, since the condition has been invalidated by the State court; and

7. Defendants' Motion for Abstention is denied, on the grounds that abstention is inappropriate where the state law issues are neither determinative nor unclear.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Memorandum and Order on counsel for plaintiff and counsel for defendants in this matter.

Dated: October 22, 1980.

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District, Judge